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SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5742

KENNETH RAY FRAKES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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Petitioner, Kenneth Ray Frakes, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on October 18, 1977 affirming the judgment of the United States District Court for the Western District of Kentucky.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not yet reported and appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered by the Clerk on October 18, 1977. The writ of certiorari was filed within 30 days of that date. 28 U.S.C. 1254(1) gives this Court jurisdiction to review the judgment by writ of certiorari.

QUESTIONS PRESENTED

I

Whether the interstate transportation of a tractor purchased with an insufficient funds check can be prosecuted under 28 U.S.C. 2314.

A. Is the term "stolen" in 28 U.S.C. 2314 to be given the same interpretation as the term "stolen" in 28 U.S.C. 2312?

B. Is United States v. Turley, infra, which interpreted 28 U.S.C. 2312 applicable to 28 U.S.C. 2314?

II

Whether the petitioner was denied his Sixth Amendment right to have compulsory process.

A. Should the trial judge have granted petitioner's motion for continuance to permit appearance of Helen Frakes who could verify petitioner's past business experience selling tractors?

III

Whether the Assistant United States Attorney overstepped the bounds of legitimate trial zeal in referring to extraneous criminal activity thereby denying petitioner his right to a fair trial.

A. Did Federal Rule of Evidence 404(b) mandate exclusion of any reference to other "cold" checks allegedly cashed by petitioner?

B. Was there a sufficient showing of similarity between the two checks on which the prosecution was based and other remote and unproven "cold checks" to justify admission pursuant to F. R. Ev. 404(b)?

IV

Whether 28 U.S.C. 2314 requires testimony that the market value of the tractors was $5,000.

A. Is the failure to offer proof that the market value of the tractors was $5,000 a failure of proof?

B. Did the trial court err in not granting the petitioner's motion for acquital where the only evidence of market value was the purchase price paid by the petitioner?

V

Whether the trial court erred in not requiring disclosure of notes of a government witness used to refresh his recollection pursuant to F. R. Ev. 612.

STATEMENT OF FACTS

On September 15, 1975, Petitioner Frakes contacted James McCarty of Murray, Kentucky who did business as J.D. Equipment Company. McCarty testified that after some "dickering" he agreed to sell Frakes a used 1973 John Deere tractor for $16,000. McCarty indicated that Petitioner gave him a check for $16,000 drawn on City National Bank, Memphis, Tennessee. The check was drawn on the business account of Mid-South Tractor Company which had been opened on August 28, 1975. An initial deposit of $9,500 had been made when the account was opened. On September 4 another deposit of $12,000 was made. On September 12, the bank on their own initiative closed the account because the account was a "headache." There was $4,537 in the account at the time it was closed. A total of $21,500 had

been deposited in the account while it was active.

Mr. McCarty testified Frakes identified himself as a tractor dealer doing business as Mid-South Tractor Company. On September 16th, the John Deere tractor was released to Frakes even though the check had not yet cleared the bank. McCarty indicated he delivered the tractor under the circumstances because "we had done business with the company that he referred to that he represented; that was the main reason I accepted the check." When McCarty discovered the check had been dishonored he attempted to recover the tractor, however, he was unsuccessful.

The Government also called Danny Flood of Mayfield, Kentucky who did business as Ford Richardson Tractor Company. On September 22, 1975 Flood met Petitioner who had come to his place of business to purchase a tractor. Petitioner represented that he was in business as Mid-South Tractor Company. The parties were able to strike a bargain for a new International Harvester tractor which was paid for by a check for $18,000 drawn on the Peoples State Bank of Midlington, Tennessee. The account had been opened on September 18, 1975 by Petitioner in the name of Mid-South Tractor Company, with an initial deposit of $1,900. This deposit was the balance of a $12,000 cashier's check negotiated at Peoples State Bank on the date the account was opened. On September 22, 1975 there was $925 in this account.

At the time the International tractor was purchased Petitioner told Mr. Flood he had purchased another tractor from Mr. McCarty. When this fact was verified by telephone, Mr. Flood permitted the tractor to be loaded onto Petitioner's truck. On September 23, Mr. Flood was contacted by J.D. Equipment Company that the check which had been given to their cashier by Petitioner had been returned.

Mr. Jackie James testified that someone identifying himself as Kenneth Ray Frakes brought the International Harvester tractor to his auction business and asked him to sell it. When he was later contacted by McCarty and informed of the circumstances surrounding the tractor he asked the local authorities to take possession of the tractor. James testified that Frakes asked him to sell the

tractor for $15,500 or $16,500. James also indicated that although he did not know Frakes personally, he did know his father for whom he had conducted auctions at All State Tractor Company.

Arthur Webster, an FBI agent, testified he arrested Frakes on January 16, 1976. Special Agent L. V. McGinty testified he obtained a statement from Frakes on April 30, 1976 at which time he admitted purchasing the International tractor and delivering it to James for resale. This oral admission contradicted James' testimony in that Frakes stated the resale price was to be $18,500. Referring to the John Deere tractor Frakes told Agent McGinty it had been sold to his father in Arkansas, however, he had no record of its later sale by his father to unknown persons. The records of this sale were in the possession of Stan Frakes and Merlon Northcutt, who had assumed control of the father's business after he was murdered. At close of the government's proof, counsel for Petitioner moved for an acquital on grounds of a failure of proof. This was overruled.

The defense called only one witness. Frakes testified he was employed by his father from 1972-75 in the tractor business. He admitted the checks in question were dishonored. He explained the bank accounts were insufficient to cover the outstanding checks because his step mother, Nell Frakes, failed to deposit money which had been earmarked for the Mid-South account by his father. Frakes admitted purchasing the John Deere tractor, however, he stated he dealt with McCarty by phone and mailed the $16,000 to him four days before going to Murray, Kentucky on September 15, 1975. The money to cover the $16,000 check was to have been deposited by his step mother at the direction of Frakes' father. At the time the check was signed Petitioner believed the check would be honored because of the anticipated deposit.

Petitioner testified his mother helped him keep the books for Mid-South Tractor Company. In fact, they were in her possession at the time of the trial. In the past he had sold and bought tractors all over Tennessee, Arkansas, Mississippi, and Louisiana. Frakes denied he told the FBI he had cashed bad checks before. On cross-examination, Frakes testified he had been office manager

from 1972 to 1975 for All State Auction Sales and Frakes Truck Company which were both owned by E. O. Frakes, the Petitioner's father. He admitted that he knew when he signed the check for the John Deere tractor that there were insufficient funds in the bank, however, he post dated the check for September 15, 1975 with the anticipation of his father depositing money in the Mid-South account before the check cleared. Petitioner denied that City National Bank had advised him on the phone that his bank account would be closed. He indicated the bank had agreed to forego closing the account until the deposit by his stepmother. Prior to the checks, the subject of this prosecution, the Petitioner had bought other vehicles and paid for them by checks which were honored. The business address which had been listed on Peoples State account was a warehouse used by the Petitioner in furtherance of his business activities.

Prior to the close of the defendant's case in chief, counsel moved for a continuance on the ground that Helen Frakes, the Petitioner's natural mother, did not appear even though she had been served with a subpeona by the United States Marshall. After an extended conference in chambers the trial judge denied the motion for a continuance ruling her testimony was not necessary. The government called no rebuttal witnesses.

Following oral arguments and instructions by the trial court the jury retired and later returned a verdict finding the Petitioner guilty on both counts in the indictment.

I

THE INTERPRETATION OF "STOLEN" IN 28 U.S.C. §2314 BY THE SIXTH CIRCUIT IS A MATTER OF FIRST IMPRESSION AND IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE SUPREME COURT.

ARGUMENT AND AUTHORITIES

The pivotal issue in this assignment of error is whether an insufficient funds check for the purchase of a tractor which is transported in interstate commerce violates the National Stolen Property Act. Neither the legislative history nor the clear meaning of 18 U.S.C. 2314 contemplates the prosecution of facts in which an object is acquired with an insufficient funds check.

As noted by the Sixth Circuit, the issue before this court is a matter of first impression. However, the analysis offered by the lower court to resolve this unique question is incorrect. By resorting to United States v. Turley, 352 U.S. 407 (1957) the court concludes that the broad interpretation of the term "stolen" in the Dyer Act (18U.S.C. 2312) should be given to the term "stolen" in 18 U.S.C. 2314. Turley is inopposite in the instant case because the legislative history of the Dyer Act indicates the interstate transportation of stolen automobiles was a critical problem unsuited for detection and prosecution by state authorities. Turley, supra at 414 The Dyer Act was the only way of suppressing this present and growing problem. The reason the term "stolen" was given a broad interpretation was to meet this pervasive problem. In the instant case there is no present or growing problem in the interstate transportation of tractors or any other commodity purchased with insufficient funds checks. Likewise, the purchase of a tractor with an insufficient funds check cannot possibly be beyond the authority or administration of state prosecution. In fact, Petitioner has been tried and convicted in Kentucky Circuit Court for the same transaction thereby coroborrating the position taken in this appeal that the use of an insufficient funds check is not a "distinctly federal crime" unsuited for local prosecution. United States v.

Sheridan, 329 U.S. 379, 387 (1946) The strained application of dicta in the Turley decision is not justified because the exigent circumstances which justified Turley are not present in the case at bar.

Congress has isolated certain types of criminal conduct which for one reason or another the states have not been able to adequately police. The Dyer Act is an example of this Congressional perogative and deals with "automobiles" and "aircrafts." Parallel to the Dyer Act are several other federal laws which Congress specifically indentified as worthy of federal enforcement. 28 U.S.C. 2318 makes it a federal crime to transport in interstate commerce an article upon which sound can be recorded on which there has been a forged or counterfeit label. Under §2316 it is a federal offense if stolen cattle are transported in interstate commerce. Even the statute in question, 28 U.S.C. 2314, specifies certain types of criminal conduct which warrants federal prosecution with primary focus on bogus or forged checks and securities. There is a dearth of case authority in which an insufficient funds check was the subject of an indictment under §2314. In fact most prosecutions under the National Stolen Property Act are due to forged, embezzled, or counterfeit securites or checks. By authorizing the prosecution of the facts of the instant case the Sixth Circuit has given a broader interpretation than Congress has authorized. United States v. Sheridan, supra; Streett v. United States, 331 F.2d 151 (8th Cir. 1964)

If Congress had thought insufficient funds checks posed a grave danger they could have enacted specific laws to provide legislative coverage. A fortiori had Congress intended the broad and inclusive interpretation given by the Sixth Circuit in the instant case there would be no need for the specific federal statutes which have been promulgated for the prosecution of interstate thefts. Justice Frankfurter in his dissent in Turley cautioned the broad coverage of §2314 given by the Sixht Circuit in the case at bar because to do so would sweep into the crowded federal system "a mass of offenses that are local in origin." 325 U.S. 407, 418

Assuming arguendo, the facts of the case at bar can be prosecuted under 18 U.S.C. 2314, clearly the evidence was insufficient as a matter of law to sustain the conviction. Considering the circumstances surrounding the two sales transactions it is impossible to detect fraud or the intent to defraud. Absent from the present case are any "badges of fraud" or any other circumstances from which an inference of fraud can arise. In United States v. Leggett, 292 F.2d 423 (6th Cir. 1961), cert. denied 368 U.S. 979 (1962) the court identified certain indicia of fraud which are normally present: inadequacy of consideration, secret or hurried transactions, and the use of dummy or ficticious persons. These were absent in the prosecution against Frakes. There was nothing secretive about the transactions with Flood and McCarty. They were bona fide sales. No fictitious names were used. Petitioner's representations of himself and his business experiences were truthful. The tractors were not stolen. They were subject of a face to face transaction between experienced businessmen. Petitioner was who he purported to be, a tractor salesman. Likewise, the exchange of checks for the tractors was exactly what it purported to be, a commercial exchange for retail goods. Although the checks were insufficient they were not of a frequency to conclusively establish Petitioner's intent to defraud. The mere fact that money was not in the bank at the time the checks reached the bank does not violate 18 U.S.C. 2314. Viewing the evidence in its most favorable light reasonable minds could not conclude beyond a reasonable doubt that Frakes intended to defraud McCarty and Flood.

II

THE PETITIONER FRAKES WAS DENIED HIS SIXTH AMENDMENT RIGHT TO HAVE COMPULSORY PROCESS WHERE THE TRIAL JUDGE REFUSED TO ENFORCE A SUBPOENA SERVED ON MRS. HELEN FRAKES.

ARGUMENT AND AUTHORITIES

Defense counsel requested the issuance of a subpoena for Helen Frakes, the mother of Petitioner, approximately four days before trial which began on Wednesday, October 13, 1976. The marshal was unable to serve her until October 13, 1976. She was served at Marianna, Arkansas. Counsel for Petitioner moved for a continuance until her presence could be assured. The government opposed the motion contending her testimony was cumulative. Petitioner's counsel pointed out Mrs. Frakes was the only one who could produce any business records maintained by Frakes. Equally as important was the fact that she was the only one who could substantiate Frakes' testimony that he was in the tractor business. The motion for continuance was denied even though the trial court noted that the Petitioner's announcement of ready was conditioned on Mrs. Frakes being present to testify.

Few rights are more fundamental than that of an accused to present witnesses in his own defense. The failure to provide avenues of compelling a subpoenaed witness to appear denies an accused his Sixht Amendment right of compulsory process. Washington v. Texas, 388 U.S. 14, 23 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973). In United States v. Barker, 553 F.2d 1013 (1977) the Sixth Circuit reaffirmed this Sixth Amendment right. The Barker decision held that a defendant need only show a witness is necessary for his/her defense in order to compel his/her attendance. "Necessary" was defined to mean relevant, material, and useful to an adequate defense. Although the prosecution sought to minimize the importance of the Petitioner's mother, apparently she was the only one who could produce business records of his business operation or to

verify the business relationship of the defendant and his father. Unlike witness Northcutt, the defendant's brother-in-law who was excused from testifying because he would not be able to aid the defense or prosecution, Mrs. Frakes was the only person identified who would have first hand knowledge of her son's prior business history. The only evidence in the record pertaining to Mrs. Frakes favors the production of this relevant witness. Petitioner indicated his mother was the only one who could corroborate his previous business experience. The relevant testimony would also rebut the insinuations of the prosecution that he was a con man engaged in a "sting." Clearly the arguments advanced by counsel for Petitioner satisfy the standard enunciated in Barker, i.e. "the appropriate standard is whether defendants have alleged that the witnesses will testify about facts that are relevant to any issue in the case." supra at 1021 (emphasis added).

It would have been within the authority of the court to issue an arrest warrant for the mother in order to determine whether she could give "necessary" testimony. To require the issuance of a subpoena and subsequently not enforce it makes Federal Rule 17 meaningless and an empty ritual. As was observed in by Westen, Compulsory Process II, 74 Mich. L. Rev. 191 (1975):

> [I]t is insufficient simply to serve the witness with a subpoena and rely upon him to appear at trial. If the witness fails to appear the state must try to enforce the subpoena by dispatching officers to arrest the witness, and, if these efforts are unsuccessful, the state 'must demonstrate that it has been unable to obtain the witness' presence through a reasearch exercised both in good faith and with reasonable diligence and care,' quoting U.S. v. Lynch, 499 F.2d 1011, 1023 (D.C. Cir. 1974). At 279-280.

Barker, supra requires that the government itself must exercise due diligence to secure the attendance of subpoenaed witnesses. Barber v. Page, 390 U.S. 719 (1968). In order to lend force to the subpoena served on Mrs. Frakes the trial court should have directed the marshal to arrest Mrs. Frakes in order to aid in the compliance of the issued subpoena. The trial had only taken one and one-half days and a continuance until the witness could be brought into court would have served to assure Petitioner's right to compulsory process. As it

presently stands by not requiring Mrs. Frakes' presence Petitioner's right of compulsory process was not fully enforced.

III

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BECAUSE OF THE PREJUDICIAL MISCONDUCT OF THE ASSISTANT UNITED STATES ATTORNEY.

ARGUMENT AND AUTHORITIES

There are two repetitive acts of misconduct which occurred during Frakes' trial where the prosecutor overstepped the bounds of legitimate trial zeal and conduct. The first area is the repeated references to extraneous criminal activity which were totally irrelevant to charges in the indictment.

In the direct examination of Mr. Milnor, the prosecutor referred to checks other than the two which were the subject of the two count indictment;

> Q. Now during the existence of that account from the time it was initially opened until the time it was closed, what was the total amount of monies deposited in that account?
>
> A. $21,500.
>
> Q. Now on the number of checks the bank has received back, what is the total number of checks in terms of value actually written on that account?
>
> A. $75,555.36.
>
> Q. So then if my math is correct, approximately $60,000 more than was ever deposited in that account, is that correct? (Emphasis added)
>
> A. Right.
>
> Q. Did Mr. Frakes ever attempt to resolve that with you personally?
>
> A. No.
>
> Q. But the persons who had submitted those checks for payment had already supplied some services of value to Mr. Frakes insofar as you know? (Emphasis added) (T. 132, 133).

On the direct examination of Agent Webster, the prosecutor asked:

> Q. Did he make a statement concerning check passing activities?
>
> A. Yes, he did. He told me he had passed bad checks before. (T. 147, 148).

In cross-examining the Petitioner Frakes, the prosecutor intentionally injected reference to other cold checks when he asked:

> Q. If your - you are worth $21,000 worth, or you had $21,000 worth of deposits at the City National Bank - you wrote $75,000 worth of checks, where were you going to come up with that extra nearly $55,000? (sic.) (T. 226)

He emphasized these extraneous checks by asking about checks allegedly written one and one-half months after the checks which were the subject of the prosecution.

> Q. Then why were you still writing checks as of October 31st on that account? (T. 229).

Another example of the over zealous conduct of the prosecutor was:

> Q. Out somewhere else? You mean you'd written $42,000 worth of checks that were no good? (T. 232).

On recross-examination the prosecutor boldly added his own personal opinion and commented on extraneous offenses when he stated:

> Q. You don't pay for much, so you say you kept records yourself. (T. 240).

In his closing argument Mr. Boyle again highlighted other check activity when he stated:

> It is interesting to note that a guy who has $21,000 in deposits but writes $75,000, in excess of $75,000 in checks... (T. 267).

It is clear these references to other criminal activity served to depict Petitioner as a "con" man. At no time did the government seek to substantively prove any of these transactions in order to show motive, plan, design or intent. Instead, the government chose to refer to them without proving any relevant pattern or relationship to the check writing under prosecution. Assuming arguendo, that substantive evidence had been offered, clearly the mere passage of insufficient funds checks in the past would be sufficiently dissimilar from issuing two checks

for farm equipment to warrant exclusion under Federal Evidence Rule 404(b). See also, United States v. Ring , 513 F.2d 1001 (6th Cir. 1975); United States v. Wiley, 534 F.2d 659 (6th Cir. 1976), cert. denied sub. nom. O'Donnell v. United States, 425 U.S. 995 (1976); United States v. Ailstock, 546 F.2d 1285 (6th Cir. 1976).

The second instance of prosecutorial misconduct occurred when Mr. Boyle stated in his closing argument:

> Consider that. Consider these facts, and consider all these things and send a message to those people who want to steal, those people who want to defraud, and those people who want to take those things which you and I have to work hard for, which you and I sweat for; and we gain in a legal way, which he wants to take away in an illegal way. (T. 272).

This clearly is more than a reference to or an appeal for law enforcement. In United States v. Barker, supra it was noted that some legitimate reference may be made to law enforcement when it is coupled with a limiting instruction. at 1025; See also, United States v. Alloway, 397 F.2d 105 (6th Cir. 1968). There was no instruction in the instant case. Considering the reference in the light probably intended by the government, it was more an appeal to the provincial prejudice of the jury, rather than to the general need for effective law enforcement.

In addition to this appeal to provincial prejudice, the prosecutor continually referred to Petitioner as a "confidence man," a "thief," a "con man" engaging in a "sting." Clearly the cumulative effect of these personal remarks along with reference to the unproven extraneous checks of $75,000 was to unfairly prejudice the Petitioner and deny him a fair trial. United States v. Leon, 534 F.2d 667 (6th Cir. 1976).

IV

THERE IS NO EVIDENCE THAT THE TRACTORS ALLEGEDLY TAKEN BY FRAUD WERE VALUED AT $5,000.

ARGUMENT AND AUTHORITIES

The record is void of any expert or non-expert testimony as to the market value of the two tractors. The record does reflect that a $16,000 check was given

for the John Deere tractor and that an $18,000 check was given for the International Harvester equipment. The government did not qualify either McCarty or Flood as expert witnesses, nor were they ever asked about the market value of the tractors. Assuming by some stretch of evidentiary imagination they could be characterized as expert witnesses, they were never asked to state an opinion as to the market value.

Under 18 U.S.C. 2311 "value" means face, par, or market value. Cases which have interpreted the value of property taken by fraud have insisted on a standard of market value at the time and place of taking. Gordon v. United States, 164 F.2d 855 (6th Cir. 1947), cert. denied 333 U.S. 862 (1948); United States v. Stoner, 487 F.2d 651 (6th Cir. 1973); Cave v. United States, 390 F.2d 58 (8th Cir. 1968), cert. denied 392 U.S. 906 (1968); Herman v. United States, 289 F.2d 362 (5th Cir. 1961); United States v. Hamrick, 293 F.2d 468 (4th Cir. 1961). Value to owner is not market value under this statute. Herman, supra at 366. The only evidence of "value" was the amount of the check given to the owners. In United States v. Nall, 437 F.2d 1177 (5th Cir. 1971), the government failed to prove the $5,000 requirement where the only witness called was the owner of the stolen securities. The court reasoned that the testimony of the owner had little probative value. When the testimony in the case at bar is compared with the Nall case one discovers there was more evidence of value in the Nall case than the instant case. At no time were the witnesses Flood and McCarty asked about the market value of the tractors. In Nall, the owner of the securities did give his opinion based on market value, nevertheless, his opinion alone was insufficient to support a verdict.

Evidence of the value of the subject property is essential to a valid conviction under 18 U.S.C. 2314. Proof must be offered that the property had a market value of $5,000 either at the time of the theft or sometime after its receipt. Nall, supra at 1187. The absence of such evidence in the instant case requires a reversal because of a failure of proof.

V

THE TRIAL COURT ERRED IN NOT REQUIRING A GOVERNMENT WITNESS TO DELIVER NOTES WHICH HE USED TO REFRESH HIS MEMORY PRIOR TO TESTIFYING IN VIOLATION OF FEDERAL RULE OF EVIDENCE 612.

ARGUMENT AND AUTHORITIES

On cross-examination Special Agent Webster acknowledged he "reviewed" investigative notes prior to his testimony. Defense counsel moved that the notes be produced for his inspection to aid in cross-examining the witness. The Government objected to this motion on the theory that to do so would reveal confidential information relating to the circumstances surrounding Frakes' arrest. Although it is unclear what the court's ruling was, apparently the motion to inspect the investigative notes was denied.

The right to inspect a writing under Federal Rule of Evidence 612 depends on two basic factors:

(1) the writing was used by the witnesses either

before or during trial to refresh the witness' memory,

and

(2) the witness has testified in open court.

An examination of the record reveals that both factors were satisfied because Webster had testified and had "reviewed" his investigative notes prior to trial. The only limitation to the production of material under Rule 612 pertains to that which is not related to the subject matter of the witness' testimony. This was not the defense raised by the Government to the use of this information. In fact the defense of confidentiality, which was urged by the Assistant United States Attorney, is not applicable to Rule 612. See generally, United States v. Smith, 521 F.2d 957, 969 (D.C. Cir. 1975).

The investigative report used by Agent Webster should also have been made available to trial counsel for Petitioner under 18 U.S.C. 3500 (a) (b) if:

(1) they were prepared by the witness on the stand

and

(2) the witness had testified prior to the request.

Although the record does not affirmatively show that Agent Webster prepared the the investigative notes, the unequivocal tenor of his testimony as well as the colloquy between the trial judge and both lawyers was that Webster prepared the notes.

As was true when discussing Rule 612 the only defense to the production of the investigative notes is that they bear no relation to the subject matter of Agent Webster's testimony. See 18 U.S.C. 3500(c). This was never a contention of the government in urging the denial of the motion to produce. See generally, United States v. Calabrese, 421 F.2d 108 (6th Cir. 1970), cert. denied 397 U.S. 1021; Roberson v. United States, 282 F.2d 648 (6th Cir. 1960), cert. denied 364 U.S. 879 (1960). Thus, any statement prepared by the witness that may be relevant to a witness' cross-examination is to be produced. United States v. Allsenberrie, 424 F.2d 1209, 1215 (7th Cir. 1970). At no time did the government contend that the notes were not prepared by Agent Webster nor that they were not relevant to his cross-examination. United States v. Graves, 428 F.2d 196, 199 (5th Cir. 1970), cert. denied 400 U.S. 960; United States v. Howard, 450 F.2d 792 (9th Cir. 1971). By not requiring the production of the investigative notes Petitioner was not able to fully cross-examine Agent Webster thereby denying him his fundamental rights of cross-examination and confrontation.

Wherefore premises considered writ of certiorari should be granted and the decision of the lower court should be reversed.

Respectfully submitted,

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606-292-5387

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief was mailed postage prepaid to George J. Long, United States Attorney, 211 U.S. Courthouse Building, Louisville, KY 40202 on the 16th day of November, 1977.

Kurt A. Philipps, Jr.

No. 76-2650

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH RAY FRAKES,
Defendant-Appellant.

APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed October 18, 1977

Before: PHILLIPS, Chief Judge; WEICK and ENGEL, Circuit Judges.

PER CURIAM. Defendant-appellant stands convicted by a jury on two counts of interstate transportation of stolen goods having a value of $5000 or more, in violation of 18 U.S.C. § 2314 (1970). We affirm.

The proofs at trial indicated that on September 15, 1975, appellant acquired possession of a used John Deere tractor from a Tennessee firm by passing a $16,500 check drawn on an account with insufficient funds. According to a statement given to the FBI by the appellant, the tractor was subsequently transported across state lines into Arkansas.

On September 22, 1975, the appellant bought another tractor, an International Harvester, from a firm in Mayfield, Kentucky. The purchase was made with an $18,000 check, again drawn on account with insufficient funds. This tractor was recovered on September 25 from an auction company in Missouri, where

the appellant had left it with instructions to sell it for $15,500 or $16,500.

With respect to both purchases, the circumstances proven at trial established that the appellant intended to take possession of the tractors without paying for them.

Appellant raises a number of issues on appeal, although we find only one to be sufficiently substantial to merit discussion. Specifically, the appellant claims that § 2314, the National Stolen Property Act, does not penalize the interstate transportation of an object acquired in exchange for an insufficient funds check.

The statute provides:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 2314 (1970).

Similarly, the Dyer Act, 18 U.S.C. § 2312 (1970), states:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

While the precise issue of this case is a matter of first impression, we conclude that the Supreme Court's construction of the Dyer Act is controlling. In *United States* v. *Turley*, 352 U.S. 407 (1957), the Court faced a split among the circuits as to the meaning to be accorded the word "stolen" in the Dyer Act. Three circuits were of the opinion that "stolen" meant the acquisition of property by means which would be punishable at common law as larceny. Three other circuits interpreted "stolen" in a more generic way, not limiting the concept

to the crime of larceny. The Supreme Court adopted the latter view, concluding that "'[s]tolen' as used in 18 U.S.C. § 2312 includes all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." 352 U.S. at 417.

The Court further noted, in language which is especially pertinent to the facts of this case:

> [A]n automobile is no less "stolen" because it is rented, transported interstate, and sold without the permission of the owner (embezzlement). *The same is true where an automobile is purchased with a worthless check,* transported interstate, and sold (false pretenses).[17]

[17] See *Boone* v. *United States*, 235 F. 2d 939 (C. A. 4th Cir. 1956); *Murphy* v. *United States*, 206 F. 2d 571 (C. A. 5th Cir. 1953); *Ackerson* v. *United States*, 185 F. 2d 485 (C. A. 8th Cir. 1950); *Hite* v. *United States*, 168 F. 2d 973 (C. A. 10th Cir. 1948). In each of these cases the defendant obtained possession of a car by passing a bad check, falsely representing that it would be paid.

352 U.S. at 416 (emphasis added).

Relying on the authority of *Turley, supra*, then Circuit Judge Stewart noted for our court:

> The issue as to whether the goods were obtained by one of the unlawful methods of acquisition referred to in [the National Stolen Property Act] is not to be decided upon the basis of technical common law definitions.

Bergman v. *United States*, 253 F. 2d 933, 935 (6th Cir. 1958). We consequently decline appellant's invitation to follow common law notions in construing the Act.

We accord the same meaning to the word "stolen" in the National Stolen Property Act as in the Dyer Act. *United States* v. *McClain*, 545 F. 2d 988, 994-95 (5th Cir. 1977); *Lyda* v. *United States*, 279 F. 2d 461, 463-65 (5th Cir. 1960); *see* Tur-

ley, supra, 352 U.S. at 412 & n. 9.[1] We therefore hold that § 2314 embraces the conduct of appellant in acquiring title to the tractors by means of checks drawn on insufficient funds.[2]

We find support for our conclusion in the fact that the National Stolen Property Act and the Dyer Act are part of an overall legislative scheme designed to thwart the misuse of interstate commerce. As the Fifth Circuit noted in *Lyda, supra,* 279 F. 2d at 464:

> The aim of [the National Stolen Property Act] is, of course, to prohibit the use of interstate transportation facilities for goods having certain unlawful qualities. This reflects a congressional purpose to reach all ways by which an owner is wrongfully deprived of the use or benefits of the use of his property. It was one way to meet the difficulties in legislative draftsmanship. The experience with this Act, the Dyer Act, and others[3] bears witness that "what has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches." Morissette v. United States, 1952, 342 U.S. 246, at page 271, 72 S.Ct. 240, at page 254, 96 L.Ed. 288, at pages 304-305. Congress by the use of broad terms was trying to make clear that if a person was deprived of his property by unlawful means amounting to a forcible taking or a taking without his permission, by

[1] As support for its construction of "stolen" in the Dyer Act, *Turley* cited with approval two cases which gave a similarly broad reading to the word "stolen" in the National Stolen Property Act: *United States* v. *Handler*, 142 F. 2d 351, 353 (2d Cir. 1944), *cert. denied* 323 U.S. 741 (1945); *Crabb* v. *Zerbst*, 99 F. 2d 562, 565 (5th Cir. 1939).

[2] We thus need not decide whether the appellant's conduct falls within the other methods of acquisition condemned by § 2314: "converted or taken by fraud." *Lyda, supra,* 279 F. 2d at 464-65; *see generally United States* v. *Vicars*, 465 F. 2d 720 (6th Cir. 1972).

[3] *E.g.*, 18 U.S.C. § 2316 (1970), (interstate transportation of stolen cattle) *construed, Cummings* v. *United States*, 289 F. 2d 904 (10th Cir.), *cert. denied* 368 U.S. 850 (1961). *Cummings* held that § 2316 condemned the interstate transportation of cattle acquired with an insufficient funds check.

> false pretense, by fraud, swindling, or by a conversion by one rightfully in possession, the subsequent transportation of such goods in interstate commerce was prohibited as a crime.

See also Turley, supra, 352 U.S. at 413-17.

Affirmed.

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No. 77-5742

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

KENNETH RAY FRAKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES

We have concluded after review of this case that petitioner's federal prosecution for interstate transportation of stolen property, after he had been convicted by the State of Kentucky for theft of the same property, was not authorized by the Attorney General, as required by Department of Justice policy, and that it would therefore be appropriate to vacate petitioner's conviction.

1. Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on two counts of interstate transportation of stolen goods having a value of $5,000 or more, in violation of 18 U.S.C. 2314. He was sentenced to consecutive terms of five years' imprisonment. The court of appeals affirmed (Pet. App.; 563 F. 2d 803).

The evidence at trial showed that petitioner purchased two tractors by passing worthless checks in the amounts of $16,500 and $18,000 (Tr. 29, 33, 35, 45, 46, 64-69, 76).[1/] Petitioner transported both tractors across state lines (Tr. 55, 56, 89). Only one tractor was ever recovered (Tr. 53).

Prior to his federal conviction, petitioner was convicted in Kentucky state court of stealing the two tractors, in violation of Ky. Rev. Stat. Ann. 514.040.[2/] He was sentenced to consecutive terms of one year and two years' imprisonment. The Kentucky Court of Appeals affirmed. Frakes v. Commonwealth, No. CA-758-MR, decided September 2, 1977.[3/]

2. As explained in our recent Memorandum in Rinaldi v. United States, No. 76-6194, decided November 11, 1977, shortly after the decisions in Abbate v. United States, 359 U.S. 187, and Bartkus v. Illinois, 359 U.S. 121, the Department of Justice adopted a formal policy of declining to prosecute individuals for acts forming the basis of a state conviction "unless the reasons [were] compelling," and then only after the specific approval of the Attorney General had been obtained. See Petite v. United States, 361 U.S. 529, 531.

1/ The $16,500 check, dated September 15, 1975, was drawn on a nonexistent account (Tr. 46). The $18,000 check, dated September 22, 1975, was drawn on an account that contained insufficient funds (Tr. 76).

2/ Petitioner was sentenced on the state charges on October 7, 1976. His federal trial began on October 13, 1976.

3/ We have been informed by the Kentucky Attorney General's office that the Supreme Court of Kentucky granted discretionary review of petitioner's state conviction on February 13, 1978.

The Attorney General did not approve this dual prosecution. After thorough consideration of the pertinent facts, we have determined that petitioner's prosecution for interstate transportation of stolen property is not supported by a compelling federal interest, in light of the substantial relationship between that charge and the offense of which petitioner was convicted in state court and the sentence imposed upon petitioner on the state charges. We therefore respectfully request the Court to permit the effectuation of the government's policy against successive state and federal prosecutions by granting the petition, vacating the judgment of the court of appeals, and remanding the case to the district court with instructions to grant the government's motion to dismiss the indictment. See Rinaldi v. United States, supra; Croucher v. United States, 429 U.S. 1034; Watts v. United States, 422 U.S. 1032; Ackerson v. United States, 419 U.S. 1099.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

FEBRUARY 1978.